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No. (1)

In the Supreme Court of the United States

STAFF SERGEANT JEREMY R. WALLACE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When law enforcement agents seize evidence based on invalid consent, can the evidence be admitted under the inevitable discovery exception to the Fourth Amendment exclusionary rule on the basis of a subsequently obtained search warrant if the law enforcement agents neither applied for nor actively pursued the warrant before seizing the evidence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6
I. CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO WHETHER "ACTIVE PURSUIT" IS REQUIRED FOR THE INEVITABLE DISCOVERY EXCEPTION TO APPLY. 6
II. APPLYING THE ACTIVE PURSUIT REQUIREMENT SECURES FOURTH AMENDMENT RIGHTS. 10
CONCLUSION 14

APPENDIX

Opinion of the United States Court of Appeals for the Armed Forces (February 13, 2008) . 1a
United States Courts of Appeals for the Armed Forces Order Granting Review (June 15, 2007) 24a
Opinion of the United States Air Force Court of Criminal Appeals (October 30, 2006) 25a

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. CONST.amend.IV ..... *passim*

Supreme Court of the United States Cases

Davis v. United States,
512 U.S. 452 (1994) 9
Johnson v. United States,
333 U.S. 10 (1948) 13
Jones v. United States,
357 U.S. 493 (1958) 13
Nix v. Williams,
467 U.S. 431 (1984) ..... *passim*

United States Court of Appeals Cases

United States v. Allen,
159 F.3d 832 (4th Cir. 1998) 8, 10, 12
United States v. Boatwright,
822 F.3d 862 (9th Cir. 1987) 7
United States v. Cabassa,
62 F.3d 470 (2d Cir. 1995) 7
United States v. Cherry,
759 F.2d. 1196 (5th Cir. 1985) 7, 10-11
United States v. Conner,
127 F.3d 663 (8th Cir. 1997) 7
United States v. Delancy,
502 F.3d 1297 (11th Cir. 2007) 7
United States v. Echegoyen,
799 F.2d 1271 (9th Cir. 1986) 8

United States v. Espinoza,
256 F.3d 718 (7th Cir. 2001) 9
United States v. Goree,
365 F.3d 1086 (D.C. Cir. 2004) 9
United States v. Kennedy,
61 F.3d 494 (6th Cir. 1995) 7
United States v. Larsen,
127 F.3d 984 (10th Cir. 1997) 7
United States v. Mejia,
69 F.3d 309 (9th Cir. 1995) 8, 11, 12
United States v. Satterfield,
743 F.2d 827 (11th Cir. 1984) 11
United States v. Silvestri,
787 F.2d 736 (1st Cir. 1986) 7
United States v. Souza,
223 F.3d 1197 (10th Cir. 2000) 8
United States v. Thomas,
955 F.2d 207 (4th Cir. 1992) 7
United States v. Wallace,
66 M.J. 5 (C.A.A.F. 2008) 1
United States v. Wallace, No. ACM 36174 (A.F. Ct. Crim. App. Oct. 30, 2006) 1

Federal Statutes

10 U.S.C. § 867a(a) 1
28 U.S.C. § 1259 1

Miscellaneous

Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 GONZ. L. REV. 295, 296 (2003/2004) 6, 7

The Petitioner, Staff Sergeant Jeremy R. Wallace, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on February 13, 2008.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Wallace,* 66 M.J. 5 (C.A.A.F. 2008), is located at Appendix (App.) 1a. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Wallace*, No. ACM 36174 (A.F. Ct. Crim. App. Oct. 30, 2006), is located at App. 25a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on February 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (2000) and 10 U.S.C. § 867a(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Around April 2003, the Air Force Office of Special Investigations (AFOSI) initiated an investigation into an allegation that Petitioner engaged in sexual relations with TND, a female under the age of 16 years. As part of the investigation, AFOSI special agents questioned Petitioner. AFOSI's investigation led the agents to believe that Petitioner and TND communicated via e-mail. Based on this, AFOSI sought to obtain copies of any e-mail messages between Petitioner and TND. The age.

Onts explained to Petitioner that they wanted to search his personal computer for evidence of his relationship with TND. The agents asked Petitioner for consent to search his computer. Petitioner signed an Air Force Form 1364 entitled, "Consent for Search and Seizure."

On April 8, 2003, the agents, along with Petitioner's first sergeant and a chaplain, escorted Petitioner to his home. Shortly thereafter, Petitioner's wife arrived. Special Agent Kenneth James testified that he did not ask Mrs. Wallace for her consent to take the computer because he felt that they already had Petitioner's consent and that was sufficient. Petitioner testified that once he realized the agents were trying to take the computer with them, he and his wife both told the agents they could not take the computer. He further testified that he

informed the agents that both he and his wife owned the computer and had equal access to it. Mrs. Wallace testified that she also informed the agents she did not want the computer seized.

Not only were the AFOSI agents and Petitioner's first sergeant present at Petitioner's home, but a chaplain was also present. The chaplain observed the search of Petitioner's home. According to the chaplain, Petitioner objected to the seizure of his computer. He also observed Mrs. Wallace protesting the seizure of the computer. Petitioner told the agents not to take the computer. It was only after the agents insisted and told Petitioner that they were required to remove the computer that he acquiesced to its removal. AFOSI agents seized Petitioner's computer. Later that day and continuing into the following day, AFOSI agents made a forensically exact copy of Petitioner's computer's hard drive. Two days after the computer's seizure, AFOSI agents discovered suspected child pornography on the forensic copy of the hard drive.

On the same day that the AFOSI agents discovered the suspected child pornography, they received a letter from Petitioner's lawyer formally revoking Petitioner's consent to search and seize the computer. Four days later, the AFOSI agents obtained authorization from a military magistrate to search Petitioner's computer for evidence of communications between Petitioner and TND and images of child pornography. The agents had not

previously taken any steps to obtain a search authorization from a magistrate.

Petitioner was charged with knowingly possessing child pornography, committing sodomy with a child under the age of 16, and committing the offense of carnal knowledge with TND. Petitioner filed a motion to suppress the evidence seized from his computer, arguing that his Fourth Amendment rights were violated and that the evidence should be suppressed under the exclusionary rule. The military judge denied the motion and concluded that even if Petitioner revoked his consent at his home, the government would have inevitably discovered the evidence on his computer because law enforcement agents had probable cause to search for the e-mails and that due to the thoroughness of the forensic software used to analyze the hard drive, the suspected child pornography would have been discovered.

The Air Force Court of Criminal Appeals held that Petitioner's written consent permitted the government investigators to search Petitioner's residence, as well as his computer, and to seize any contraband or items they considered to be evidence of a crime. The Air Force Court further held that Petitioner's consent was freely given and was not withdrawn until after the child pornography had already been discovered on his computer. The Air Force Court ultimately concluded that the military judge did not abuse her discretion in denying Petitioner's motion to suppress. App. 31a.

On June 15, 2007, the Court of Appeals for the Armed Forces granted review of the case to consider both the validity of Petitioner's consent to the computer's seizure and the inevitable discovery exception's applicability. App. 24a.

After granting review, the Court of Appeals for the Armed Forces found no error in the military judge's denial of Petitioner's motion and affirmed the Air Force Court of Criminal Appeals' decision. App. 1a-23a. The majority held that while Petitioner's initial consent to search his home and computer was valid, he "revoked any consent to seize the computer." App. 5a. The court therefore concluded that the computer could not have been seized under a consent theory. But the majority opinion determined that the computer's seizure and subsequent thorough search were valid because the "AFOSI would have inevitably discovered the child pornography pursuant to a validly executed search authorization based on probable cause." App. 5a-6a.

There were two separate concurring opinions. Both concluded that the evidence was admissible under a consent theory. Judge Baker's concurrence also disagreed with the majority's decision regarding the inevitable discovery exception. App. 14a. He concluded that the majority's approach to inevitable discovery "parts from United States Supreme Court precedent as well as one of the fundamental objectives of the Fourth Amendment." App. 14a.

REASONS FOR GRANTING THE WRIT

"[A] very significant split among the circuits . . . exists concerning the question of whether a separate and independent investigation must be ongoing at the time of the constitutional illegality in order for the inevitable discovery doctrine to be applicable. This has been termed the issue of 'active pursuit.'" Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 GONZ. L. REV. 295, 296 (2003/2004) [hereinafter 39 GONZ. L. REV.]. This Court should grant this petition to resolve this "very significant split."

I.

CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO WHETHER "ACTIVE PURSUIT" IS REQUIRED FOR THE INEVITABLE DISCOVERY EXCEPTION TO APPLY.

In 1984, this Court adopted the inevitable discovery exception to the Fourth Amendment exclusionary rule. *Nix v. Williams*, 467 U.S. 431 (1984). *Nix* states that application of the inevitable discovery exception "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* at 444 n.5. Nevertheless, a conflict exists among the United States courts of appeals as to whether the inevitable discovery exception applies absent law

enforcement agents' active pursuit of a warrant prior to an unlawful search and seizure.

In 2003, Professor Eugene Shapiro observed:

> Five courts of appeals have expressly rejected the view that *Nix* imposes an active pursuit requirement. A sixth appears to have implicitly rejected it by its citation and apparent approval of such opinions. Four courts of appeals have employed an active pursuit approach. Another court has characterized the subject as "debatable," and a twelfth has not addressed the issue.

39 GONZ. L. REV. at 316 (footnotes omitted).

The four courts of appeals that have adopted an active pursuit require are the Second, Fifth, Eighth, and Eleventh Circuits. *See United States v. Cabassa,* 62 F.3d 470, 473 (2d Cir. 1995); *United States v. Cherry,* 759 F.2d. 1196, 1206 (5th Cir. 1985); *United States v. Conner,* 127 F.3d 663, 667 (8th Cir. 1997); *United States v. Delancy,* 502 F.3d 1297, 1315 (11th Cir. 2007).

The five courts of appeals that rejected the active pursuit requirement are the First, Fourth, Sixth, Ninth, and Tenth Circuits. *United States v. Silvestri,* 787 F.2d 736 (1st Cir. 1986); *United States v. Thomas,* 955 F.2d 207, 210 (4th Cir. 1992); *United States v. Kennedy,* 61 F.3d 494 (6th Cir. 1995); *United States v. Boatwright,* 822 F.3d 862 (9th Cir. 1987); *United States v. Larsen,* 127 F.3d 984 (10th

Cir. 1997). The Court of Appeals for the Armed Forces can now be added to that list.

But at least two of the Circuits that have rejected the active pursuit requirement have expressed some qualms about applying the inevitable discovery exception without it. The Ninth Circuit has observed that it "has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant." *United States v. Mejia*, 69 F.3d 309 (9th Cir. 1995). The court added, "[T]o 'excuse the failure to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement.'" *Id.* at 320 (quoting *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986)). And the Tenth Circuit appears to hold that one of the prerequisites to applying the inevitable discovery exception is that law enforcement agents must take steps *before* the unlawful search to obtain a search warrant. *United States v. Souza*, 223 F.3d 1197, 1205 (10th Cir. 2000). The Fourth Circuit has also expressed caution about the inevitable discovery exception's applicability absent active pursuit. *See United States v. Allen*, 159 F.3d 832, 842 (4th Cir. 1998) ("[t]he existence of probable cause for a warrant, in and of itself, and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid").

The Third Circuit, which Professor Shapiro characterized as appearing to reject the active pursuit requirement, does not appear to have revisited the issue. Nor apparently has the Seventh Circuit, which as Professor Shapiro notes has termed the active pursuit requirement "debatable." *United States v. Espinoza*, 256 F.3d 718, 725 n.7 (7th Cir. 2001). Finally, the District of Columbia Circuit appears still not to have decided whether to apply the active pursuit requirement. *See United States v. Goree*, 365 F.3d 1086, 1089 n.2 (D.C. Cir. 2004).

This "very significant split" should be resolved to determine whether active pursuit is a necessary condition for the inevitable discovery doctrine's applicability and, if not, the extent to which the absence of active pursuit is a factor weighing against application of the inevitable discovery doctrine in a particular case.

Resolving this split by issuing a writ of certiorari to the United States Court of Appeals for the Armed Forces would be consistent with this Court's approach in *Davis v. United States*, where this Court granted review of a court-martial case to resolve a circuit split concerning the consequences of a suspect's ambiguous reference to counsel during custodial interrogation. *See* 512 U.S. 452, 456 (1994).

II.

APPLYING THE ACTIVE PURSUIT REQUIREMENT SECURES FOURTH AMENDMENT RIGHTS.

Admitting evidence from an unlawful search by assuming that a warrant would have been issued later nullifies the Fourth Amendment and its protections. "The inevitable discovery doctrine applies to alleviate 'formalistic' and 'pointless' applications of the exclusionary rule, *Nix*, 467 U.S. at 445, but it does not and cannot eliminate Fourth Amendment protections." *Allen*, 159 F.3d at 841. The active pursuit requirement restrains the inevitable discovery exception from eliminating Fourth Amendment protections. It further protects against the admission of illegally obtained evidence and police misconduct. As the Fifth Circuit reasoned:

> [W]hen the police have not been in active pursuit of an alternate line of investigation that is at a minimum supportable by leads, the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is "inevitable" in the absence of the illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced. While suppression in such a case may put the prosecution in a worse position because of the police misconduct, a contrary

> result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means.

United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985).

Evidence obtained from an illegal search cannot be cured by law enforcement agents seeking a search warrant after the illegal conduct. The Eleventh Circuit applies the inevitable discovery doctrine only if the police possessed and were pursuing a lawful means of discovery at the time of the illegal conduct. *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984). The Eleventh Circuit appears to hold that obtaining a search warrant after an unlawful search and seizure does not trigger the inevitable discovery exception: "The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable." *Id.*

Requiring active pursuit as a necessary condition to invoke the inevitable discovery exception will protect, rather than destroy, the Fourth Amendment requirement to obtain a warrant before searching a home. Even some of the circuits that have rejected the active pursuit requirement have expressed concern over the dangers of applying the inevitable discovery exception merely because probable cause existed or because law enforcement agents obtained a search warrant after the illegal conduct. *See*

Mejia, 69 F.3d at 320 (observing that there would never be any reason for law enforcement to seek a warrant if the inevitable discovery exception was applied when law enforcement had probable cause but failed to attempt to obtain a search warrant); *Allen*, 159 F.3d at 841 (observing that the existence of probable cause for a warrant, in and of itself, and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid).

If this Court adopts the active pursuit requirement or restricts the inevitable discovery exception from applying on the basis of a subsequently obtained search warrant that was neither applied for nor actively pursued before an unlawful search and seizure, then the evidence that led to Petitioner's conviction should have been suppressed. Law enforcement agents took no steps to pursue a search authorization (the military equivalent of a search warrant) either before or during the unlawful search. It was not until six days after evidence was obtained from the illegal seizure that the law enforcement agents took any steps towards pursuing a search authorization.

Writing for the Court, Justice Harlan cautioned, "Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely

nullified." *Jones v. United States*, 357 U.S. 493, 498 (1958). The Court of Appeals for the Armed Forces did exactly what *Jones* cautioned against. The lower court's decision upheld the admissibility of evidence unlawfully seized from Petitioner's home merely because the law enforcement agents *could have* obtained authorization to search. This application of the inevitable discovery doctrine removes the "neutral and detached magistrate" as a buffer between the citizenry and "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). The active pursuit requirement protects against opening the door for law enforcement agents to freely search without a warrant when they believe probable cause exists. Without an active pursuit requirement, the privacy of citizens' homes will be vulnerable to the hunches and conjectures of law enforcement agents, entirely unregulated by a magistrate's stamp of approval until *after* an intrusion. This Court's adoption of the active pursuit requirement would protect the Fourth Amendment rights of society in general.

CONCLUSION

This Court should grant certiorari to resolve a conflict among the United States courts of appeals as to whether the inevitable discovery exception applies when law enforcement agents are not actively pursuing alternative means of obtaining the evidence at the time of an unlawful search and seizure.

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully subn itted,

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Appendix

66 M.J. 5 (2008)

UNITED STATES, Appellee
v.
Jeremy R. WALLACE,
Staff Sergeant, U.S. Air Force,
Appellant

No. 07-0194.
Crim. App. No. 36174.

U.S. Court of Appeals for the Armed Forces.

Argued Oct. 17, 2007

Decided Feb. 13, 2008

STUCKY, J., delivered the opinion of the Court, in which EFFRON, C.J., and ERDMANN, J., joined. BAKER and RYAN, JJ., each filed a separate opinion concurring in the result.

For Appellant: *Captain Vicki A. Belleau* (argued); *Lieutenant Colonel Mark R. Strickland* and *Major John N. Page III* (on brief).

For Appellee: *Captain Jason M. Kellhofer* (argued); *Colonel Gerald R. Bruce* and *Major Matthew S. Ward* (on brief).

Judge STUCKY delivered the opinion of the Court.

We granted Appellant's petition to determine whether the military judge erred when he denied a defense motion to suppress the results of a search of Appellant's computer. We hold that the military judge correctly denied the motion and affirm the decision of the United States Air Force Court of Criminal Appeals.

I.

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification each of carnal knowledge, sodomy with a child, and possessing child pornography, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 925, 934 (2000), respectively. The sentence adjudged by the court-martial, and approved by the convening authority, consisted of a dishonorable discharge, confinement for six months, and reduction to the lowest enlisted grade.

II.

Appellant's conviction stems from the sexual relationship he pursued with a fifteen-year-old female military dependent, TND. In the course of pursuing their investigation, two special agents of the Air Force Office of Special Investigations (AFOSI) questioned Appellant on April 8, 2003. After being read his Article 31, UCMJ, 10 U.S.C. § 831 (2000), rights, Appellant spoke with the agents, only to ultimately request a lawyer. He agreed to proceed without a lawyer when investigators could not make contact with the Area Defense Counsel. According to

Appellant's testimony, the agents informed him that their investigation would reveal enough evidence to sentence Appellant to confinement for life and would require Appellant to register as a sex offender. Since Appellant admitted that he communicated with TND via e-mail and instant messenger, the AFOSI agents explained that they wanted to search Appellant's personal computer for evidence. Appellant signed an AF Form 1364, entitled, "Consent for Search and Seizure," and consented to the general search of his home and computer.

After questioning Appellant, both AFOSI agents escorted him back to his house, where the three met another agent (apparently recruited to help disconnect and transport the computer), Appellant's first sergeant, and a chaplain. Appellant's wife arrived home shortly thereafter. Though he initially led the agents to his computer, once Appellant and his wife noticed the agents removing it, they objected. He testified that he told the agents the following:

[The computer] has our life on it. It has our photo albums on it. It's got our banking on it. All of our financial stuff is on there. You know, I use it to do all of our bill paying and everything else. Our online business is on there. I was like "You can't take it." Then my wife even started going nuts at that time.

In making her findings of fact on consent to the computer's removal, the military judge apparently relied on the testimony of the chaplain present at the search. He testified that Appellant protested when the investigators began removing the computer and

that Appellant ultimately acquiesced—stating, "Well, okay"—after the agents explained "they had to take it." That is, after Appellant expressed his displeasure with the seizure of his computer, one of the investigators explained that they had to take the computer as a matter of routine. Only then, and in apparent resignation to the investigators' actions (according to the military judge) did Appellant acquiesce to the seizure.

The investigators then removed the computer and transported it to the laboratory. The day-long forensic analysis revealed the e-mail and chat traffic between Appellant and TND, as well as files containing child pornography. Following standard practice, AFOSI agents copied the computer's hard drive. A judge advocate at the legal office telephoned investigators on April 10, 2003 to report that Appellant had formally revoked his consent. In response to this development, the agents obtained a search authorization from a military magistrate. One of the agents testified that even if Appellant had never provided consent, or revoked the previously given consent, he would have sought search authorization from the magistrate in any event.

At trial, Appellant's defense counsel made a motion to suppress all evidence obtained from the search of Appellant's computer on the theory that Appellant involuntarily consented in the first place or, alternatively, revoked consent when he told agents not to take the computer. The military judge denied the motion and concluded that Appellant had freely consented and only withdrew consent on April 10, 2003 after child pornography had been

discovered on the computer. She also found that even if Appellant had revoked his consent at the search site, the Government would have inevitably discovered the images because there was probable cause to search for e-mails and instant messages related to Appellant's relationship with TND. The Air Force Court of Criminal Appeals affirmed those findings. *United States v. Wallace*, 2006 CCA LEXIS 282, 2006 WL 3085641 (A.F. Ct. Crim. App. Oct. 30, 2006) (unpublished).

III.

Appellant argues that the search of his home should have been more limited in scope and, in any event, should have stopped after he revoked his consent and merely acquiesced to the color of authority. Under Appellant's theory, the military judge erred when she admitted the evidence of child pornography from the computer's hard drive.

We review that ruling for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Findings of fact and conclusions of law are reviewed under the clearly erroneous and de novo standards, respectively. *Id.*

We find that even though Appellant initially consented to a general search of his home and computer, his subsequent exhortation to the AFOSI agents revoked any consent to seize the computer. However, while Appellant's ultimate acquiescence to the seizure came under pressure from authority, we find no error in the military judge's denial of Appellant's motion to suppress because AFOSI

would have inevitably discovered the child pornography pursuant to a validly executed search authorization based on probable cause.

A.

Military Rule of Evidence (M.R.E.) 314(e)(3) states that consent to search "may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time." Appellant argues that because he gave his consent to search while under the impression that AFOSI agents would merely take copies of certain e-mails, the agents' decision to take the computer itself went beyond the limits that he had imposed on the search in the first place. M.R.E. 314(e)(3).

That argument does not fit the facts of this case. Appellant's signed "Consent for Search and Seizure" form shows that he explicitly consented to a broad search that allowed AFOSI agents to search Appellant's "residence—118-1 Maine St. TAFB (Travis Air Force Base), CA; [and his] computer." The form expressly gives investigators permission to "take any letters, papers, materials, articles or other property they consider to be evidence of an offense." It is the objective reasonableness of the consent—not Appellant's supposed impression—that controls.

M.R.E. 314(e)(3) implements the limited scope rule of *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), which requires investigators to account for any express or implied limitations on a consent to search.

Those limitations, however, cannot be determined on the basis of the subjective intentions of the consenting party. As the Supreme Court concluded in *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991), the standard is "that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* at 251 (rejecting the accused's attempt to suppress evidence of cocaine possession by arguing that while he consented to a general car search at a traffic stop, he believed that consent did not permit the officer to open a closed bag that ultimately contained cocaine). Clearly, a reasonable person could conclude that an authorization permitting the search and seizure of "my computer" would permit AFOSI investigators not only to search, but also to remove the computer from the premises.

B.

Whatever the scope of his initial consent, Appellant argues that the military judge erred when she denied Appellant's motion to suppress the evidence because Appellant clearly revoked that consent when he stated "[y]ou can't take [the computer]." Appellant, however, conflates two separate concepts: the search and the seizure. His exhortation may have revoked his consent to seize the computer, but disapproval of the seizure cannot, without more, affect the consent to search in the first place.

A seizure of property, for purposes of the Fourth Amendment, occurs "when there is some meaningful

interference with an individual's possessory interest in . . . property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). As such, a seizure can occur either with or without an attendant search. *See, e.g., Soldal v. Cook County*, 506 U.S. 56, 62, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) (holding that a police tow of tenant's mobile home to dispossess that tenant constituted a seizure under the Fourth Amendment because the "Amendment protects property as well as privacy"). In either case, the search and the seizure necessitate separate analyses under the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (noting that the warrantless seizure of blood from railroad employees and the subsequent chemical analysis of that blood constituted separate invasions of the employees' privacy interests). If searches and seizures are separate concepts, consent to one is not, without more, consent to the other; similarly, revoking consent to one does not of itself revoke consent to the other.

Appellant signed a "Consent for Search and Seizure" that clearly gave AFOSI the right to search Appellant's residence and computer and to take away anything they considered evidence of an offense. His objection—"[y]ou can't take it"—clearly embraced the seizure of the computer, and nothing more. As such, while Appellant consented to both a search and any attendant seizures, his pleas to investigators to leave the computer revoked his consent to this particular seizure, but not to the search.

C.

Appellant's attempt, pursuant to *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006), to pin evidence of consent revocation on his wife's objection to the computer's seizure fails because *Randolph* is inapplicable to this case. *Randolph* stands for the narrow proposition that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120. *Randolph* would not permit a non-accused co-resident to supersede the wishes of the accused co-resident because, after all, Fourth Amendment rights "are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969).

D.

As soon as Appellant revoked his consent to the seizure, AFOSI agents informed him that "they would have to take the computer" as "a matter of routine." Appellant acceded, but argues that this second so-called consent amounted to mere passive acquiescence to the color of authority in violation of *Schneckloth v. Bustamonte*. We agree, and find that under the totality of the circumstances, Appellant's acquiescence did not constitute free and voluntary consent to the computer's seizure after revocation of his initial consent to seize.

We determine voluntariness from all the circumstances. *Schneckloth*, 412 U.S. at 226-27 (applying a totality-of-the-circumstances analysis and citing cases in which the Supreme Court has analyzed the facts for voluntariness on its own).

The Air Force court has laid out the following non-exhaustive factors with respect to the voluntariness of consent: (1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or intimidation; (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors; (4) the suspect's mental state at the time; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights. *United States v. Murphy*, 36 M.J. 732, 734 (A.F.C.M.R. 1992); *United States v. Baker*, 45 M.J. 538, 541 (A.F. Ct. Crim. App. 1996) (adopting the test from *Murphy*). Based on this test, which we adopt, Appellant's ultimate consent to the computer's seizure lacks sufficient indicia of voluntariness.

Appellant clearly faced restrictions on his liberty. The military judge stated in her findings of fact that three individuals escorted Appellant from the AFOSI building to his home —the two AFOSI agents who conducted the initial interrogation and Appellant's first sergeant, Master Sergeant Kemp. Another AFOSI agent joined, along with a chaplain. That Appellant was never technically under apprehension is not dispositive; no court that has analyzed this prong has considered apprehension determinative. *See, e.g., United States v. Olivier-Becerril*, 861 F.2d

424, 426 (5th Cir. 1988) (noting that the defendant was not free to leave the inspection area at a Border Patrol checkpoint even though he was never technically in custody or under arrest). Authority figures, one of whom was Appellant's first sergeant and thus responsible for unit discipline, not only helped conduct the search, but also escorted Appellant from the AFOSI building to his home. If Appellant faced no restrictions on his liberty, the escort would have been unnecessary.

The facts of the escort and the presence of several authority figures also created a coercive and intimidating atmosphere that stifled Appellant's inclination to refuse consent to the computer's seizure once the AFOSI agents informed Appellant that they had to take the computer as a matter of routine.

Furthermore, though Appellant was a twenty-six-year-old staff sergeant with nearly eight years of service, it is doubtful that he knew he could withdraw consent once given. The signed consent form does not explicitly state that the signer may withdraw consent; Article 31, UCMJ, warnings do not include an addendum clarifying that consent, once given, can be withdrawn; and none of the AFOSI agents testified that he advised Appellant that he could withdraw his consent at any time. What is more, when Appellant objected to the removal of the computer, the seizing agent stated that they "would have to take the computer" as a matter of routine procedure. Regardless of his prior belief, Appellant likely believed that he could not

refuse consent given the agent's assurance that seizure was a routine requirement.

Finally, Appellant never consulted counsel throughout his questioning and the subsequent search. As such, since four of the six *Murphy* factors weigh against a finding of voluntary consent, we hold that Appellant's ultimate consent to the seizure of the computer was not a valid consent, but rather mere acquiescence to the color of authority.

E.

Notwithstanding the validity of the seizure, the military judge did not err when she denied Appellant's motion to suppress because, as she found, the evidence would have been inevitably discovered pursuant to a validly executed warrant.

The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means. *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). M.R.E. 311(b)(2) embodies this exception, stating that "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." This Court explained the doctrine in *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982) and, more recently, in *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999), where this Court upheld the legality of a warrantless search of the appellant's car and

seizure of stolen stereo equipment because overwhelming probable cause and routine police procedure made discovery of the evidence inevitable. *Id.* at 210-11.

In this case, the images of child pornography on Appellant's computer hard drive would similarly have inevitably been discovered. As the military judge correctly concluded, had Appellant not ultimately consented to the seizure of the computer, the AFOSI investigators would have sought and obtained a search authorization based on probable cause. After all, during his interrogation, Appellant admitted to a sexual relationship with a young girl with whom he communicated mostly via e-mail and instant messenger. This alone encouraged investigators to focus on the computer as a source of evidence and created sufficient probable cause to allow AFOSI to obtain an authorization to search for, and seize e-mails and messages between Appellant and TND. Though the authorization would have been limited to e-mails and messages, one of the AFOSI investigators testified that the forensic software employed would have skimmed the computer's hard drive, recovering all saved data. As the military judge concluded, investigators would have had to sift through all the captured data to find relevant e-mail traffic. As such, the files containing child pornography would have been inevitably discovered through this valid search. It should also be noted that although we have ultimately concluded that the initial consent to seize had been terminated as a matter of law, the fact that the law enforcement officers proceeded on the belief that they had consent

underscores that this is not a case involving a deliberate intent to evade the warrant requirement.

IV.

We therefore find no error in the military judge's denial of Appellant's motion to suppress and affirm the decision of the United States Air Force Court of Criminal Appeals.

BAKER, Judge (concurring in the result):

I concur with the result reached by the Court today, and agree that *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006), does not apply to this case. However, I write separately to distinguish my views regarding the inevitable discovery doctrine. The majority's approach parts from United States Supreme Court precedent as well as one of the fundamental objectives of the Fourth Amendment, which is to encourage, and in most cases, compel the government to obtain a warrant (or in military context command authorization) before conducting a search or seizure encompassed within the Amendment's scope. Further, I would affirm this case on the ground that Appellant consented to the subsequent seizure of his computer at his house. In this respect, the military judge's findings of fact are not clearly erroneous.

I. Inevitable Discovery

The Court's decision regarding the inevitability of the discovery of the child pornography on Appellant's computer is predicated on at least three assumptions: first, the Court assumes that, because

questioning of Appellant and the victim revealed that the two communicated over the Internet, AFOSI agents would have used that information to show probable cause in an application to search Appellant's computer for e-mails and instant messages; second, the Court assumes that a detached magistrate would have granted a search warrant based on that evidence; and third, it is assumed that, having received authorization to search for e-mails and instant messages, AFOSI would have inevitably also discovered the images of child pornography on Appellant's hard drive. This string of assertions does not bear the indices of inevitability of discovery found in cases such as *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984), and the doctrine that evolved from that case. Rather, the majority adopts in its place a "could have-would have" approach to the warrant requirement.

First, there is no evidence in the record that AFOSI actually attempted to obtain a search warrant.[1] Instead, the Court today essentially holds that the unadjudicated strength of the prosecution's case was sufficient to permit a violation of Appellant's right against unreasonable search and seizure. Such an interpretation of the inevitable discovery doctrine is too broad to be constitutionally tenable. As the Fourth Circuit has held, the

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[1] Had the AFOSI at least dispatched an agent to obtain a warrant, the subsequent search could arguably have been admissible under the inevitable discovery doctrine. *See United States v. Lamas*, 930 F.2d 1099, 1102 (5th Cir. 1991).

inevitable discovery doctrine "cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment." *United States v. Allen*, 159 F.3d 832, 842 (4th Cir. 1998); *see also United States v. Cherry*, 759 F.2d 1196, 1206 (5th Cir. 1985); *United States v. Johnson*, 22 F.3d 674, 683 (6th Cir. 1994); *United States v. Mejia*, 69 F.3d 309, 319 (9th Cir. 1995); *United States v. Souza*, 223 F.3d 1197, 1203 (10th Cir. 2000). Today's holding creates an exception that swallows the rule, against which Justice Harlan warned when he wrote, "[w]ere federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Jones v. United States*, 357 U.S. 493, 498, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958).

The Court today points to our previous holdings in *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982), and *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999), for the proposition that the inevitable discovery doctrine would permit the admission of evidence obtained in violation of a defendant's Fourth Amendment rights. Neither of these cases is applicable here, however, since in each case the admission of the evidence was justified on grounds derived from a recognized exception to the warrant requirement, and independent from the unlawful search. In *Kozak*, the Court concluded that

Criminal Investigation Division (CID) agents who illegally opened a briefcase containing stolen goods would inevitably have discovered the same as part of a search incident to the arrest of the suspect who later claimed the briefcase. 12 M.J. at 393. Moreover, *Owens* concerned the search of an automobile, a location that permits warrantless searches, so long as probable cause can be shown. 51 M.J. at 209; *see Coolidge v. New Hampshire*, 403 U.S. 443, 460, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). In the present case, no similar exception to the warrant requirement exists to independently justify the search of Appellant's computer. It bears repeating: in order for the evidence to have been admissible under the inevitable discovery doctrine, the Government would have to have shown that investigators "possessed, or were actively pursuing, evidence or leads" that independently "would have led to the discovery of the evidence." *Kozak*, 12 M.J. at 394. No such active, independent line of investigation was being pursued in this case before the issue of Appellant's consent arose.

Second, assuming that AFOSI could have searched Appellant's computer for e-mails and instant message traffic, it does not follow that discovery of the child pornography would have been inevitable. That the search software at the time of the examination of Appellant's computer was too primitive to permit a focused search for e-mails and instant messages does not excuse the resulting violation of Appellant's Fourth Amendment rights.

II. Consent to Seize and Search

Although I disagree with the majority's application of inevitable discovery, I would affirm this case. Like the majority, I find the critical factual point to have occurred in Appellant's home. Having revoked his consent to the initial search and seizure, Appellant either consented anew to the seizure of his computer or merely acquiesced to that seizure in the face of the law enforcement presence he encountered. I also agree with the majority that the six-part factors approach in *United States v. Murphy*, 36 M.J. 732, 734 (A.F.C.M.R. 1992), is an appropriate mechanism with which to evaluate this issue. However, while there are arguments on both sides, I balance the factors differently than the majority and conclude that Appellant did not merely acquiesce to authority in consenting to the search of his computer.

The first factor is the degree to which the suspect's liberty was restricted (e.g., whether the suspect was under escort, under arrest or apprehension, held in the office of law enforcement agents, or called to the commander's office). *Murphy*, 36 M.J. at 734. This Court has adopted an objective test as to whether one is in police custody. *United States v. Catrett*, 55 M.J. 400, 409 (C.A.A.F. 2001). Furthermore, the United States Supreme Court has stated that "[i]n determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of

movement of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)) (quotation marks omitted).

In this case, the record shows that Appellant was brought neither to the AFOSI office nor his home under arrest. Appellant did not feel he was free to leave, but he was neither handcuffed nor restrained in any way. Thus, even if Appellant subjectively believed that he was not free to leave, the military judge objectively found otherwise. This ruling is not clearly erroneous. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007). Of course, had the military judge found that Appellant was not free to leave, that factor alone would not necessarily negate his consent, since none of the factors identified in *Murphy* are necessarily determinative. 36 M.J. at 734.

The second factor concerns the presence of any coercion, promises, direct orders, threats (including threats that if consent to search is withheld, an authority to search will be obtained), or other forms of intimidation or pressure. *Id.* Here, the military judge specifically found that "Staff Sergeant Wallace's consent was not given under coercion, force or threats." Again, there is nothing in the record that would show that such a finding was clearly erroneous. The military judge's determination is supported in many respects by the presence of the base chaplain during the search of Appellant's home. First, the presence of the chaplain tempers concern

that Appellant was in some manner coerced into consenting to an overbearing or overwhelming law enforcement presence, because the chaplain was someone to whom Appellant might have reached out if he was feeling unduly pressured.

Second, the chaplain served as a neutral witness to the proceedings. Thus, the military judge was not limited to considering the statements of witnesses who might have had biases one way or the other.

Finally, even considering the chaplain's testimony in a light most favorable to Appellant, the chaplain did not testify to a coercive atmosphere. He stated:

I would not use the word "protest." I would probably use the word "resisted." . . . . He initially said "Don't take the computer." But then they said "Well it is just a matter of routine. We've got to do this." His response was "Well, okay." And then he seemed resigned to them taking it at that particular point.

To me this does not describe consent "quickly and easily given" as the military judge stated. But it does look more like acceptance of the inevitable, with some resignation, rather than "mere acquiescence" to a law enforcement presence. Therefore, in light of this testimony, and the military judge's conclusions drawn from it, I would conclude that the military judge's findings of fact were not clearly erroneous and that her conclusions of law were correct.

Alternatively, if one discounts the effect of the presence of the chaplain, the question of whether

Appellant was coerced into consenting would ultimately come down to Appellant's word against those of the AFOSI agents, and this is insufficient to find clear factual error on the part of the military judge. As the United States Supreme Court noted in *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985), "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."

The third *Murphy* factor considers Appellant's awareness of his right to refuse consent. 36 M.J. at 732. The record reflects that the consent form Appellant initially signed included the acknowledgment, "I also understand that if I do not consent, a search cannot be made without a warrant or other authorization recognized in law." However, Appellant was not expressly advised he could refuse consent during the subsequent search and seizure at this home. Neither does the record reflect facts sufficient to infer such knowledge based on Appellant's age, intelligence, training and experience. Arguably, the record favors a finding that Appellant was not aware that he could revoke his consent. Although Appellant was a noncommissioned officer with almost eight years of military service, this might be insufficient—in light of the agents' failure to inform him he could revoke consent—to presume Appellant was aware of the nuances of his Fourth Amendment rights.

With respect to the fourth *Murphy* factor, 36 M.J. at 734, it seems intuitive that an individual placed in Appellant's position—accused of a crime, his

house searched, and facing the consequences of his alleged act on his family relations—would be under considerable stress. However, such anxiety cannot, by itself, serve to undermine consent. If the alternative were true, every defendant accused of a crime would be found to lack free will.

The fifth factor listed in *Murphy* is whether the suspect had consulted with counsel. 36 M.J. at 734. The military judge found that during questioning by AFOSI, Appellant requested counsel, and was told by AFOSI agents that the Area Defense Counsel was unavailable. However, it was Appellant who subsequently reinitiated the line of questioning that led to the search of Appellant's home, and Appellant waived his right to counsel before questioning resumed. Thus, Appellant is hard pressed to argue that he was denied counsel.

The line between true consent and mere acquiescence in the presence of law enforcement can be quite ephemeral. At some point, I imagine many accused persons who become aware that their conduct has been discovered acquiesce to law enforcement requests because they feel, in a descriptive sense, the inevitable consequence of their actions. From the accused's standpoint, this would seem much closer to mere acquiescence than meaningful choice and consent. The real question then is not whether the accused merely acquiesced in the face of law enforcement pressure or presence, but rather, whether or not he was aware that he had a choice to consent or not. That is, of course, different from concluding that as a result of the

stress of the situation, one has no real good choice but only bad options that lead to the same result.

When the totality of the circumstances is considered in this case, it becomes evident that four of the five *Murphy* factors relevant to the case at hand argue for concluding that Appellant fell into this latter category, and as a matter of law, consented to AFOSI seizing and searching his computer. Here, Appellant's age, experience, intelligence, and military grade are relevant. We are not dealing with a new enlistee. Additionally, the presence of the chaplain and his testimony are also central to this conclusion.

Thus, while there is nothing inevitable about the discovery of the child pornography on Appellant's computer, his valid consent rendered the evidence properly admissible. I therefore concur in the result.

RYAN, Judge (concurring in the result):

I agree with the reasoning undertaken in Part II of Judge Baker's separate opinion, join him in concluding that Appellant consented to the search of his computer, and thus concur in the result reached by the Court today.

UNITED STATES, Appellee

v.

JEREMY R. WALLACE,

Airman Basic U.S. Air Force,

Appellant

65 M.J. 284

United States Court of Appeals for the Armed Forces

June 15, 2007

Review granted on the following issue:

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO GRANT THE DEFENSE MOTION TO SUPPRESS THE RESULTS OF THE SEARCH OF APPELLANT'S PERSONAL COMPUTER IN LIGHT OF APPELLANT'S REVOCATION OF CONSENT, HIS SUBSEQUENT ACQUIESCENCE TO PRESSURE BY LAW ENFORCEMENT, AND THE INAPPLICABILITY OF THE INEVITABLE DISCOVERY DOCTRINE TO THE FACTS. *SEE GEORGIA v. RANDOLPH*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).

Briefs will be filed under Rule 25.

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JEREMY R. WALLACE

United States Air Force

ACM 36174

October 30, 2006

Sentence adjudged 18 October 2004 by GCM convened at Travis Air Force Base, California. Military Judge: Anne L. Burman.

Approved sentence: Dishonorable discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

STONE, SMITH and MATHEWS

Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, contrary to his pleas, of one specification each of carnal knowledge, sodomy with a child under the age of 16, and possession of child pornography, in violation of UCMJ Articles 120, 125, and 134, 10 U.S.C. §§ 920, 925, 934. The general court-martial, consisting of officer and enlisted members sentenced him to a dishonorable discharge, confinement for 6 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

Before us, the appellant claims, inter alia, that the evidence is legally and factually insufficient to sustain his carnal knowledge conviction, because he presented a valid mistake of fact defense as to the child's age. Under the facts of this case, we disagree and affirm.

Background

The appellant was a 25-year-old aircraft maintainer stationed at Travis Air Force Base (AFB), California, when he met TD, a 14-year-old girl, via the Internet, sometime in June or July 2002. The appellant was married and the father of two children; TD was a military dependent, living on Travis AFB. Both the appellant and TD were going through difficult times at home, and they each lent the other a sympathetic ear. Within a short time, they agreed to meet face-to-face. About two to three weeks after meeting online, the appellant's relationship with TD had progressed to the point

that he had inserted his fingers into her vagina and she had performed oral sodomy on him.

The appellant and TD continued to correspond online through the summer and fall of 2002. For some period of time thereafter, TD stopped communicating with the appellant because her parents learned about her online conversations and ordered her to stop, but she later resumed their correspondence. In November 2002, TD told the appellant it was her birthday. A few months later, in February 2003, TD and the appellant agreed to meet on Valentine's Day at his home on base. During that meeting, the appellant engaged in oral and anal sodomy with TD, as well as vaginal intercourse. TD was 15 years old at the time.

The appellant's point of contention stems from TD's testimony that, although 14 years old when she met the appellant, she claimed at the time to be 15 years old. Thus, the appellant claims, while he knew TD was under the age of 16 at the time of their first encounters in the summer of 2002, he labored under a mistake of fact as to her age when they consummated their sexual relationship in 2003. Appellant claims since TD told him about her birthday in November 2002, he reasonably believed she was 16 years old.

Noting that the appellant bears the burden of proving the affirmative defense of mistake of fact, the government contends that the appellant has failed to make his case. The government highlights: (1) the nature of the meetings between the appellant and TD, which were brief, clandestine

encounters; (2) the appellant's claim to government investigators that TD was "sketchy" about her age; (3) the appellant's claim, in a sworn statement, to have been unsure of TD's exact age;[1] and (4) TD's youthful appearance and demeanor in court. Taking into account all of the evidence, the government contends, the appellant's mistaken belief—if it existed at all—was not reasonable.

Mistake of Fact

We review the appellant's claims of legal and factual insufficiency de novo, examining all of the evidence admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, as the prevailing party at trial, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Quintanilla,* 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of his guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325.

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[1] The appellant variously claimed TD told him she was "16, 17, and 18 but never told [him] an exact age."

The appellant's assignment of error requires us to apply these standards in a rather novel way. The appellant does not challenge any of the elements of the offense of carnal knowledge: first, that he engaged in an act of sexual intercourse with TD; second, that TD was not his spouse; and third, that at the time of the sexual intercourse, TD was under the age of 16. *Manual for Courts-Martial, United States (MCM),* Part IV, P 45(b)(2) (2005 ed.).[2] Moreover, after reviewing the record independently, we find the evidence both legally and factually sufficient to establish all of those elements beyond a reasonable doubt. Instead, as noted above, the appellant contends he proved by a preponderance of the evidence that TD was more than 12 years of age, and that he believed TD to be at least 16 years of age, at the time of the intercourse. Such a belief, if reasonable, amounts to a complete defense to the offense of carnal knowledge. The appellant bears the burden of persuasion on this type of defense; the standard is proof by a preponderance of the evidence. *MCM,* Part IV, P 45(c)(2).

As the government pointed out at trial, the appellant's secretive behavior during his affair with TD could plausibly be construed as indicative of his belief that she was too young. While the interpretation urged by the appellant; that he tried to keep his relationship with TD secret because he was married and not because he feared she was underage, is also reasonable, we evaluate this

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[2] The 2002 edition of the *MCM,* in effect at the time of the appellant's trial, contained provisions substantially identical to the current edition.

evidence in the light most favorable to the prosecution. *Quintanilla,* 56 M.J. at 82. We concur with the argument of appellate government counsel that, considering the appellant's admission that TD was "sketchy" about how old she was and gave him three different stories about her age—stories that could not all have been true—the members could rationally have concluded that reliance on what she told him was not reasonable. Finally, the government at trial pointed to TD's youthful appearance and demeanor in court, arguing that the appellant could not have reasonably believed her to be of age. Appellate government counsel offers the same argument on appeal. We have previously held that such personal observations by the trier of fact may be sufficient to defeat a claim of mistake of fact, and renew that holding here. *See United States v. Magee,* ACM S29513 (A.F. Ct. Crim. App. 2000) (unpub. op.). S*ee also United States v. Cendejas,* 62 M.J. 334, 338 (C.A.A.F. 2006) (factfinder may determine whether individual is of age based on physical appearance alone).

We find that a rational trier of fact could have concluded the appellant failed to meet his burden of proof. Further, taking into account all of evidence in the record of trial, we are ourselves unpersuaded that the appellant reasonably believed TD was of age. This assignment of error is without merit.

Other Assignments of Error

We resolve the remaining assignments of error adversely to the appellant. The appellant's written consent permitted the government investigators to

search his residence, as well as his computer, and to seize any contraband or items they considered to be evidence of a crime. The military judge found that the appellant's consent was freely given and was not withdrawn until after the child pornography had already been discovered on his computer. We conclude the military judge did not abuse her discretion in denying the appellant's motion to suppress. *See United States v. Rodriguez,* 60 M.J. 239, 246 (C.A.A.F. 2004). We likewise conclude that, in light of the appellant's failure to inform his trial defense counsel at any time prior to the conclusion of his trial that he might have been elsewhere at the time the pornography was downloaded, his counsel were not ineffective in failing to put on an alibi defense. *See United States v. Polk,* 32 M.J. 150, 152-53 (C.M.A. 1991).

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Judge STONE and Judge SMITH participated prior to their reassignment.